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ORIGINAL No. 16

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

IN THE MATTER OF:

THOS. E. WILLIAMS, Tax Commissioner of the State of Nebraska, et al,

Petitioners,

VS.

JOSEPH W. WOODROUGH, District Judge of the United States District Court for the District of Nebraska,

Respondent.

RETURN OF JOSEPH W. WOODROUGH, DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA.

JOSEPH W. WOODROUGH,
District Judge, Appearing for Himself.

THE COCKLE PRINTING CO., LAW BRIEFS, OMAHA, NEB.



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RETURN OF JOSEPH W. WOODROUGH, DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA.

TO THE HONORABLE WILLIAM HOWARD TAFT, CHIEF JUSTICE OF THE UNITED STATES, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The answer of Joseph W. Woodrough, Judge of the District Court of the United States for the District of Nebraska to the rule upon him to show cause why a writ

of mandamus should not issue commanding him in said court, to call to his assistance two other Federal judges, as provided for by Section 266 of the Judicial Code as amended by the Act of February 13, 1925, to hear and determine the cases herein on final hearing, respectfully answers and certifies to the Honorable Supreme Court of the United States as follows:

First, respondent believes that the Petitioners have correctly set out the matters appearing of record in the proceeding herein, so far as the said petition undertakes to relate them.

Second, respondent states that before denying the motion of the Petitioners herein that he call to his assistance two Federal judges to sit with him to rule on the exceptions to the report of the Special Master at final hearing of said cause, he examined the bill of complaint herein and concluded that the relief sought therein was that a certain valuation of plaintiff's property as fixed by the State Board of Equalization be declared null and void and that the property of the Plaintiff be discharged from the pretended lien of said valuation, and for an injunction against certain county officers, to-wit, county treasurers of seventy-one counties of the State of Nebraska, restraining and enjoining them against collecting taxes under and in accordance with a certain assessment based upon said valuation, which it was alleged was null and void because unlawful and discriminatory under the laws and constitution of the State of Nebraska (pp. 11, 12, 13, 19 and 20 appendix) and of the United States, (pp. 12 and 13 appendix).

Respondent further ascertained from an examination of said bill of complaint that the only officer of the State

of Nebraska who was designated therein as a party defendant was the Tax Commissioner of the State of Nebraska, who, under the constitution of the State of Nebraska (Section 28 of Article IV (p. 11 appendix), has jurisdiction over the administration of the revenue laws and together with the Governor, Secretary of State, State Auditor and State Treasurer, has power to review and equalize assessments of property for taxation within the State of Nebraska, and who, under the statutes of the State of Nebraska (Section 5829, Compiled Statutes of Nebraska, 1922), (p. 13 appendix) is authorized to pass upon the forms, schedules, tax books and records employed by county administrative officers and also by statute (Sections 5830, 5886, 5887, 5890, 5892 and 5899, Compiled Statutes of Nebraska, 1922, (pp. 14, 15, 16, 17, 18, 19, appendix), is required to report to the State Board of Equalization property subject to taxation improperly omitted from the tax list, but that said Tax Commissioner in no wise is charged with the duty of collecting the taxes levied by the state or county authority, and has no duties to discharge in connection therewith, so that respondent concluded that the bill of complaint failed to state a valid cause of action against said Tax Commissioners.

Third, respondent further states that in denying said motion that he call to his assistance two Federal judges to sit with him at final hearing, he gave consideration to the provisions of the statute, to-wit: Section 266 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. at L. 936, 938 (Section 380, Title 28, U. S. Code), which relate only to proceedings "restraining the action of any officer of such state in enforcement or execution of such statute, or in the enforcement or execution of

an order made by an administrative board or commission acting under and pursuant to the statutes of such state * * * * *."

Fourth, respondent, in denying said motion that he call to his assistance two additional Federal judges to sit with him to assist him in disposing of said injunction, was of the opinion that the county treasurers, defendants in said action against whom injunctive relief was prayed, were not officers of the State of Nebraska within the purview of said statute, Section 380 Title 28 U. S. Code, and that therefore the provisions of said statute of the United States did not apply in requiring the presence of three judges at final hearing in said suit in the District Court.

In arriving at these conclusions, respondent gave consideration to the following facts and authorities, among others, to-wit:

(a) That in another proceeding of a similar nature in the same court, wherein the Chicago, Burlington & Quincy Railroad Company filed a similar bill of complaint against the State Tax Commissioner and certain county treasurers of the State of Nebraska, seeking to enjoin them in the collection of certain taxes which had been assessed for the year 1927, respondent, upon application of the plaintiff therein for a temporary injunction, called to his assistance for hearing thereon, Honorable Kimbrough Stone, Judge of the Circuit Court of Appeals for the Eighth Circuit, and Honorable Thomas C. Munger, Senior District Judge of the Dis-

trict Court of the United States for the District of Nebraska, and that on November 29th, 1927, said judges and this respondent sitting in the District Court under the provisions of Section 266 of the Judicial Code, determined and concluded that there was not involved in said proceeding any injunction sought against any state officer, and that therefore the proceeding was not within the provisions of Section 266 of the Judicial Code requiring the attendance and hearing before a court of three judges, and thereupon discontinued the hearing before the three judges.

(b) That in a similar proceeding in the District Court for the Southern District of Ohio, Eastern Division, which involved facts almost identical with those here before the court, with the sole exception that no member of the Tax Commission had been joined as a party defendant, the court, consisting of Donahue, Circuit Judge, and Hough and Westenhaver, District Judges, in the case of *Connecting Gas Co. v. Imes,* 11 Fed. (2nd) 191, decided and determined that a bill of complaint, seeking injunctive relief against county treasurers of five Ohio counties to enjoin the collection by them of taxes which had been levied and assessed by the Tax Commission of Ohio, did not present a suit within the purview of Section 266 of the Judicial Code in that said county treasurers were not officers of the State of Ohio.

(c) That in a similar proceeding entitled *Cumberland Telegraph & Telephone Co. v. City of Memphis,* 198 Fed. 955, the District Court for the Western District of Tennessee, Western Division, consisting of Denison, Circuit Judge and McCall and Sanford, District Judges,

decided that a bill of complaint seeking a temporary injunction to restrain the mayor and other officers of the City of Memphis against enforcement of an ordinance of said City fixing rates to be charged by the complainant telephone company, did not present a suit within the purview of Section 266 of the Judicial Code for the reasons that the words in said section of said Judicial Code "statute of a state" were used in their ordinary sense as meaning a law directly passed by a state legislature and that the words "officer of such state" meant an officer whose authority extended throughout the state.

(d) That county treasurers are not included among the officers enumerated in the Constitution of the State of Nebraska, but are elected by the voters of their respective counties pursuant to the provisions of the statutes of the State of Nebraska, the legislature having by said constitution been given authority to "provide by law for the election of such county and township officers as may be necessary," (Constitution of Nebraska, Sections 4 and 5, Article IX, page 94, Compiled Statutes of Nebraska, 1922), (p. 12 appendix). Among the duties of county treasurers as provided by statute is that they shall "receive all money belonging to the county from whatsoever source derived and all other money which is by law directed to be paid to him." (Section 4964, Compiled Statutes of Nebraska, 1922 (p. 13 appendix). Said county treasurers are also by statute declared to "be ex-officio county collectors of all taxes levied within their respective counties" (Section 5996, Compiled Statutes of Nebraska, 1922 (p. 20 appendix). It is the duty of said county treasurers to make collection in conformity

with the tax list prepared by the county clerk (Section 5984, Compiled Statutes of Nebraska, 1922 (p. 19 appendix), which tax list is a record of all taxes levied upon property within the county, including state, county, city, village, school district and road district purposes and special assessments, and it is further provided that the county treasurer shall "report and pay over the amount of the taxes and special assessments due to towns, districts, cities, villages, corporations and persons collected by him, when demanded by the proper authorities or persons" (Section 6039, Compiled Statutes of Nebraska, 1922 (p. 20 appendix). So far as state taxes are concerned, it is provided by statute that the treasurers of the several counties "shall pay into the state treasury all funds in their hands belonging thereto on or before the 10th day of each month, and at such other time as the state treasurer shall require" (Section 6035, Compiled Statutes of Nebraska, 1922 (p. 20 appendix). Transfer of such state funds by the county treasurer to the state treasury has been held to be merely a ministerial act. *State, Ex. rel Hall vs. Ure,* 99 Nebr. 486, 490. While the bond of the county treasurer is security for the payment of state taxes to the state treasurer (Section 6042, Compiled Statutes of Nebraska, 1922 (p. 20 appendix), no duty to make such payments arises until the state auditor has furnished suitable blanks for the making of settlements. *State v. Ure,* 102 Nebr. 648, 652, 653. Under these statutes, respondent is of the opinion that the county treasurer by receiving state taxes does not thereby become a state officer any more than by receiving taxes for school districts, cities and villages, drainage districts and irrigation districts, he becomes an officer of said district, cities or villages.

(e) Respondent further submits the following decisions of courts of the several states relating to the question as to whether an officer of a county is a state officer, among such decisions being *Travis County v. Jourdan,* 91 Tex. 217, 42 S. W. 543, wherein the Supreme Court of Texas refused to issue a writ of mandamus against a county treasurer because he was held not to be an "officer of the state government," within the meaning of the statute; *State v. Dillon,* 90 Mo. 229, 2 S. W. 417, wherein a sheriff was held not to be a "state officer" within the purview of the constitution of Missouri; *Donahue v. County of Will, et al.,* 100 Ill. 94, wherein a county treasurer was held not to be a civil officer of the state so as to prevent his summary removal by the Board of Supervisors and to limit the removal to proceedings for impeachment and also *State v. Oleson,* 15 Nebr. 247, citing and relying upon the case of *Donahue v. County of Will, supra,* wherein a similar decision was made under the laws and constitution of the State of Nebraska in respect to the removal of a sheriff.

(f) Respondent further gave consideration to the purpose and intent of Congress in enacting Section 266 of the Judicial Code and more particularly in respect to the amendment of February 13, 1925, relating to the presence of three judges on final hearing. At the present time there are numerous suits in equity pending in the District Court of the United States for the District of Nebraska in respect to the collection of taxes by county treasurers for the years 1922 to 1927 inclusive. Not only is it a difficult matter for litigants to secure the presence of three judges to pass upon applications for temporary

injunctions in such cases and to determine them upon final hearing, but the direct consequence of a requirement that such matters necessitate the presence of three judges is that a direct appeal in all such cases would thereupon lie to the Supreme Court of the United States. Respondent was of the opinion that the statute, to-wit, Section 266 of the Judicial Code, does not show that Congress intended that suits of this character wherein the relief sought was against county treasurers were of such a nature as to fall within the purview of said statute.

(g) It is true that interlocutory injunctions have been issued by three Federal judges under Section 266 of the Judicial Code against defendant officials described in the reports as county officers, but as respondent is advised and believes, the question of the right of one Federal judge to grant the relief in the place of three Federal judges was not at issue or determined in any of those suits. Typical cases are:

Noble v. Douglas, 274 Fed. 672, 687. On appeal to this court, 261 U. S. 165, 170;

Fenner v. Boykin, 3 Fed. (2nd) 674, 676. On appeal to this court, 271 U. S. 240, 244;

Van-Deman & Lewis Co. v. Rast, 214 Fed. 827, 834. On appeal to this court, 240 U. S. 342, 368;

Marcus Brown Co. v. Feldman, 269 Fed. 306, 318. On appeal to this court, 256 U. S. 170, 199;

Orr v. Allen, et al, 245 Fed. 486, 488. On appeal to this court, 248 U. S. 35, 37.

And these are the causes and reasons which this respondent offers why a mandamus should not issue commanding him to call to his assistance two other Federal judges to hear and determine the questions herein at final hearing, and states that in making the rulings complained of in the petition herein, he believed and now asserts that he exercised lawful judicial discretion. But he respectfully submits to the judgment of the court and will enforce by order any direction given by the court in the premises.

JOSEPH W. WOODROUGH,

District Judge of the United States District Court for the District of Nebraska.

APPENDIX

The following sections of the Constitution of the State of Nebraska, and statutes of at state; also, sections of the Constitution of the United States, are referred to in the return:

Section 28, Article IV, Constitution of State of Nebraska, pp. 74 and 75, Comp. Stat. Neb., 1922:

> "A Tax Commissioner shall be appointed by the Governor with the advice and consent of the Senate. He shall have jurisdiction over the administration of the revenue laws of the state, and together with the Governor, Secretary of State, State Auditor, and State Treasurer shall have power to review and equalize assessments of property for taxation within the state. He shall have such other powers and perform such other duties as the Legislature may provide. His term of office and compensation shall be as provided by law."

Sections 1 and 4, Article VIII, Constitution of State of Nebraska, pp. 89 and 91, Comp. Stat., supra:

> Sec. 1. "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the Legislature."

Sec. 4. "The Legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

Sections 4 and 5, Article IX, Constitution of State of Nebraska, p. 94, Comp. Stat., supra:

Sec. 4. "The Legislature shall provide by law for the election of such county and township officers as may be necessary."

Sec. 5. "The Legislature shall provide by general law for township organization, under which any county may organize whenever a majority of the legal voters of such county voting at any general election shall so determine; and in any county that shall have adopted a township organization the question of continuing the same may be submitted to a vote of the electors of such county at a general election in the manner that shall be provided by law."

Section 1, of the 14th Amendment to the Constitution of the United States, p. 19 Comp. Stat., supra:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with-

out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 4964, Comp. Stat., Neb. 1922:

"It shall be the duty of the county treasurer to receive all money belonging to the county, from whatsoever source derived, and all other money which is by law directed to be paid to him. All money received by him for the use of the county shall be paid out by him only on the warrants issued by the county board according to law, except where special provision for the payment thereof is or shall be otherwise made by law."

Section 5820, supra:

"All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade."

Section 5829, supra:

"The form of all blanks, forms, schedules, books of instruction, assessment and tax books, records, and all other forms which may be necessary or expedient for the proper administration of this act, or of the revenue laws in general shall, on or before the fifteenth day of January of each year, be approved by the tax commissioner, and all such schedules, forms and documents shall be uniform throughout the several counties in so far as the same is possible and practicable. The tax commissioner shall, on or before the first day of January of each year furnish the county clerk of each county, forms for all schedules for the listing and assessment of personal property; and the county clerk of each county shall, on or before the first day of April in each year cause to be printed, a sufficient number of such schedules

for the use of the county and deliver the same to the county assessor."

Section 5830, supra:

"Whenever it shall be made to appear to the tax commissioner that any property has been improperly omitted from the tax list or assessment roll of any district or county for any year; or, if assessed, that the same has been undervalued, as compared with like property in the same county or in the state, so that the assessment for such year in such district or county is grossly unfair or inequitable whether the same has been equalized by the county board of equalization or the state board of equalization and assessment or not, he shall report the same to the State board of equalization and assessment, and said board shall examine into the facts, and shall cause to be served upon any person, company or corporation affected by such reassessment, an order to show cause why such reassessment should not be made; which order to show cause shall be served for a period of at least ten days prior to the date fixed for such hearing; and at such hearing if satisfied that it would be for the best interest of the state that a reassessment of such property be made, said board may appoint a special assessor and such deputy assessors as may be necessary to cause a reassessment to be made of all or any real and personal property, or either, in any such district or county as to them may seem proper, to the end that all property in such district or county shall be assessed equitably as compared with like property in such district, county or state: *Provided, however,* that no such action shall be taken by the tax commissioner, or others under the provisions hereof, unless the same be commenced by December first, next following the date of the original assessment: *Provided, further, however,* that no land

shall be re-assessed under the provisions of this section where the same shall have changed ownership otherwise than by will, inheritance or gift; *Provided, further,* that where an appeal has been taken from the original assessment and an adjudication thereof had by the court, such adjudication shall be final and not subject to modification by re-assessment."

Section 5886, supra:

"Every corporation organized under the laws of any other state or county transacting business in Nebraska, or offering for sale in Nebraska, any of its securities, shall, on or before the fifteenth day of April of each year, file a statement with the tax commissioner, giving the name and post office address of each person residing in Nebraska owing any of such stocks or shares together with the number of shares held by each person and the par and market values as of April first of that year."

Section 5887, supra:

"The president, cashier or other accounting officer of every bank or banking association, loan and trust or investment company, shall, on the first day of April of each year, make out a statement under oath, showing the number of shares comprising the actual capital stock of such association, bank or company; the name and residence of each stockholder, the number of shares owned by each, and the value of the shares on the first day of April, and shall deliver such statement to the proper county assessor. Such capital stock shall thereupon be listed and assessed by him at the same rate as tangible property is assessed in the taxing district where the principal place of business of such association, bank or company is located. Whenever any such bank, association or company shall have acquired real estate or other

tangible property which is assessed separately, the assessed value of such real estate or tangible property shall be deducted from the valuation of the capital stock of the association or company. *Provided,* mortgages, trust deeds, and all other liens or interest in real estate less than a fee title, and held as security for loans, shall not be considered or assessed as part of the capital stock for purposes of taxation, and shall not be deducted from the capital, surplus or undivided profits. The county assessor shall determine and settle the true value of each share of stock after an examination of such statement; and in case of a national bank an examination of the last report called for by the comptroller of the currency, and if a state bank the last report called for by the department of trade and commerce, and if the county assessor deem it necessary, he may make an examination of the officers of such bank, association or company under oath, in determining and fixing the true value of such stock, and shall take into consideration the market value of such stock, if any, and the surplus and undivided profits. Such association, bank or company shall pay the taxes assessed upon its stock and shall have a lien thereon for the same; and for purposes of assessment it shall not be permissible to deduct from the amount of the capital stock, the value of any United States government securities owned by such bank, association or company. Such taxes shall be in lieu of all other taxes on intangible property of such bank, association or company, as well as all other taxes on the stock or shares of such bank, association or company in the hands of the individual."

Section 5890, supra:

"Each and every person, association, co-partnership, joint stock company or corporation, organized

under the laws of this state or any other state or government engaged in street railways, waterworks, electric lights, gas works, natural gas, mining, express, telegraph, telephone business in the State of Nebraska, and all other like companies and like associations, or owning or operating a pipe line in the State of Nebraska, whether such line is used for the transmission of oil, heat, steam or any substance to be used for lighting, heating, power or other purpose, or for the transmission of articles by pneumatic or other power, shall, in addition to listing the tangible property owned in each governmental subdivision by such person, association, co-partnership, joint stock company or corporation, and being taxed thereon in like manner as other tangible property is taxed in the governmental subdivision, shall furnish to the local assessor and to the tax commissioner a sworn statement of the amount of the capital stock, setting forth particularly:

First. The name and location of the company;

Second. The amount of capital stock authorized, and the number of shares into which capital stock is divided;

Third. The amount of capital stock paid up;

Fourth. The market value, or if of no market value, then the actual value of the shares of stock;

Fifth. The true value of its franchise, if any, granted under and by virtue of any law of this state or ordinance of any city or village;

Sixth. The length of time such franchise was granted, together with the date of same;

Seventh. The total amount of indebtedness, except the indebtednes for current expenses, excluding from expenses the amount paid for the purchase or improvement of property;

Eighth. The amount of capital on which a dividend was declared during the last preceding year;

Ninth. The date of each dividend declared during said year, ending with the last day of the last preceding December;

Tenth. The rate per cent of each dividend declared.

Eleventh. The total amount of each dividend declared during the year ending with the last day of the last preceding December.

Twelfth. Gross earnings during said year.

Thirteenth. Net earnings during such year.

Fourteenth. Amount of surplus;

Fifteenth. Amount of profit added to sinking fund during said year;

Sixteenth. Maximum price at which shares of stock sold during said year;

Seventeenth. Minimum price at which shares of stock sold during said year;

Eighteenth. Average price at which shares of stock sold during said year."

Section 5892, supra:

"For each day's neglect or refusal to furnish such statement, the company shall forfeit the sum

of twenty-five dollars, and for each day's refusal to furnish its books for inspection, if demand therefor is made by the tax commissioner, the company shall forfeit the sum of twenty-five dollars, to be recovered in an action in the name of the state."

Section 5899, supra:

"The governor shall be ex-officio chairman of such board, and preside at all meetings when present. In the absence of either the president or secretary, their places may be filled temporarily by other members of the board. Three members shall constitute a quorum for the transaction of business."

Section 5984, supra:

"The tax list shall be completed and delivered to the county treasurer on or before the first day of November annually, and before its delivery the county clerk shall attach a warrant under the seal of the county, which warrant shall be signed by the clerk and shall in general terms command the treasurer to collect the taxes therein mentioned according to law; but no informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes or sale, or other proceedings for the collection of taxes as provided for in this chapter. Whenever it shall be discovered that the warrant in this section provided for was not at the proper time attached to any tax list, for any preceding year or years, in the hands of the county treasurer, the county clerk shall forthwith attach such warrant which shall be in the same form, and shall have the same force and effect as if it had been attached to such tax list before the delivery thereof to the county treasurer."

Section 5996, supra:

"The county treasurers of the several counties of this state shall be ex-officio county collectors of all taxes levied within their respective counties. No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the treasurer's office and pay his taxes."

Section 6035, supra:

"The treasurers of the several counties shall pay into the state treasury all funds in their hands belonging thereto on or before the tenth day of each month, and at such other times as the state treasurer shall require, and the sums so paid in shall be the identical state warrants, if any received by the treasurer for payment of the taxes, or in coin or in treasury notes of the United States."

Section 6039, supra:

"The county treasurer shall report and pay over the amount of tax and special assessments due to towns, districts, cities, villages, corporations and persons, collected by him, when demanded by the proper authorities or persons."

Section 6042, supra:

"The bond of every county treasurer shall be held to be security for the payment by such treasurer to the state treasurer and the several cities, towns, villages and the proper authorities and persons, respectively, of all taxes and special assessments which may be collected or received by him on their behalf, by virtue of any law in force at the time of giving such bond, or that may be passed or take effect thereafter."